IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	2 CA-CR 2006-0259
Appellee,	)	DEPARTMENT B
	)	
v.	)	MEMORANDUM DECISION
	)	Not for Publication
MARK JONATHAN SALCIDO,	)	Rule 111, Rules of
	)	the Supreme Court
Appellant.	)	
	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20053798

Honorable Howard Fell, Judge Pro Tempore

AFFIRMED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and Alan L. Amann
Tucson
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V Á S Q U E Z, Judge.

¶1 Appellant Mark Jonathan Salcido was charged by indictment with one count of stalking, a class three felony; fourteen counts of aggravated harassment, a class five felony; and fourteen counts of aggravated harassment, a class six felony.[1] All of the charges were designated as domestic violence offenses and arose from a series of events that occurred between July 30 and August 28, 2005. A jury found Salcido guilty on all charges.[2] Finding that he had an historical prior felony conviction, the trial court sentenced Salcido to the presumptive prison term of 6.5 years on the stalking charge, to be served concurrently with presumptive, concurrent prison terms of 1.75 years on the class six felony harassment charges and 2.25 years for the class five felony harassment charges. On appeal, Salcido argues the trial court violated his due process rights by using a different prior conviction to enhance his sentence than the prior conviction alleged in the indictment; he was entitled to a jury trial on the state's allegation that he had a prior felony conviction; and, there was insufficient evidence to prove he had an historical prior felony conviction. He also argues the sentences imposed by the trial court were excessive. For the reasons discussed below, we affirm.

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[1]Salcido was also charged with two counts of attempted first-degree murder, but these were dismissed before trial on the state's motion.

[2]We note that the sentencing memorandum erroneously substituted "aggravated assault" for "aggravated harassment" in eleven of the twenty-eight counts. However, for each count the memorandum cited the relevant statute for aggravated harassment, A.R.S. § 13-2921.01.

Facts and Procedural Background

¶2 We view the evidence in the light most favorable to sustaining the convictions. *State v. Cropper*, 205 Ariz. 181, ¶ 2, 68 P.3d 407, 408, *supp. op.*, 206 Ariz. 153, 76 P.3d 424 (2003). Salcido and the victim, V. S., were married in 1995, and they had a son in 1996. In the course of the relationship, which the state describes as "tumultuous," Salcido and V. S. divorced and remarried twice. In 1997, Salcido was convicted of a number of domestic violence offenses against V. S., including aggravated assault and arson for rolling his truck into her truck and setting her apartment on fire. The events that led to the charges in the current case began on July 30, 2005, when, during a period of separation from Salcido, V. S. had him served with an order of protection. After he was served with the order, Salcido made hundreds of telephone calls to V. S. and her family, followed V. S.'s car, punctured her tires, broke a window at her house, vandalized her spa, and threatened to harm her and their son. These incidents ended with Salcido's arrest on September 8.

¶3 The state alleged Salcido previously had been convicted of aggravated assault with a deadly weapon/dangerous instrument. However, in finding that Salcido had a prior conviction for sentence enhancement purposes, the trial court instead referred to his conviction for arson of an occupied structure.

Discussion

¶4 Salcido claims for the first time on appeal that his due process rights were violated when the trial court enhanced his sentence with a different felony conviction than

the one the state had alleged in the indictment. Salcido relies on *State v. Branch*, 108 Ariz. 351, 354-55, 498 P.2d 218, 221-22 (1972), in which our supreme court stated that "[a] fundamental element of due process of law is that an accused be advised of the charges against him." However, as this court has noted, "[t]he charges in an indictment and the allegations of a prior conviction are not procedural or substantive equivalents." *State v. Cons*, 208 Ariz. 409, ¶ 4, 94 P.3d 609, 611 (App. 2004).

¶5 Because Salcido did not raise this issue below, we review only for fundamental error. *Id.* ¶ 3. Fundamental error is error that goes to the foundation of the case, takes from the defendant a right essential to his defense, and is of such a magnitude that the defendant did not receive a fair trial. *State v. Henderson*, 210 Ariz. 561, ¶¶ 23-26, 115 P.3d 601, 608 (2005). To succeed under this standard, Salcido must show both that the error was fundamental and that it caused him prejudice. *Id.* ¶ 26. The burden of persuasion on fundamental error review is shifted to the defendant, to "discourage [him] from . . . 'reserving the "hole card" of a later appeal on [a] matter that was curable at trial, and then seek[ing] appellate reversal.'" *Id.* ¶ 19, *quoting State v. Valdez*, 160 Ariz. 9, 13-14, 770 P.2d 313, 317-18 (1989) (first two alterations added).

¶6 Even if it was error for the trial court to substitute the convictions, Salcido cannot show the requisite prejudice entitling him to relief. "Fundamental error review involves a fact-intensive inquiry, and the showing required to establish prejudice therefore differs from case to case." *Id.* ¶ 26. Here, the state alleged Salcido had been convicted of

aggravated assault with a deadly weapon/dangerous instrument, citing Pima County case number CR-59038. In that case Salcido was also convicted of arson of an occupied structure. Apparently, the judge's personal knowledge—he had also been the judge in that case—caused him to erroneously refer to the latter conviction at the bench trial on Salcido's prior conviction. The court found "that Mr. Salcido has previously been convicted in CR-59038 of . . . arson of an occupied structure . . . [and] that the prior conviction is one which can be used to enhance any sentence that the Court imposes in [the current case]." At sentencing, the trial court referred to "a prior conviction of CR-59038" without mentioning the specific charge, while the sentencing memorandum refers to both the assault and the arson charges. However, the presumptive sentences imposed were consistent with Salcido having one, not two, historical prior felony convictions.

¶7 In *State v. Williams*, 144 Ariz. 433, 698 P.2d 678 (1985), our supreme court was presented with an analogous situation. After a jury verdict of guilt and before the sentencing phase of the trial, the state amended an allegation of two prior convictions by omitting one conviction and adding a different one in its place. *Id.* at 442, 698 P.2d at 687. Finding the defendant had not been prejudiced by the amendment, our supreme court found as follows:

> We have stated that a defendant is not prejudiced by noncompliance with A.R.S. § 13-604(K) provided he is on notice before trial that the prosecution intends to seek the enhanced punishment provisions of the statute. Here petitioner had timely notice of the prosecutor's intent to use prior convictions to seek enhanced punishment. Two prior felony

> convictions were timely alleged; the post-verdict amendment substituted a third felony for one of the previously alleged felonies. The substitution was improper under A.R.S. § 13-604(K), but petitioner suffered no prejudice since there was adequate pre-verdict notice.

Id. (citations omitted).

¶8 Similarly, we find Salcido had adequate pre-verdict notice that the state intended to seek an enhanced sentence and the substitution of one prior conviction for another did not alter his sentence. Although he did not receive *any* pre-verdict notice the arson conviction would be used to enhance his sentence, the record indicates the trial court simply misspoke when it referred to that conviction instead of the one for aggravated assault. And as we have noted, the matter would have been "curable" had it been brought to the court's attention at that time. *Valdez*, 160 Ariz. at 13-14, 770 P.2d at 317-18. Moreover, as in *Williams*, Salcido suffered no prejudice. The aggravated assault and arson convictions were part of the same case and, thus, proved by the same conviction records. Salcido therefore could have produced nothing different to challenge the sufficiency of one conviction that he could not have produced to challenge the sufficiency of the other. Because Salcido has thus failed to show he was prejudiced, he has failed to meet his burden under the fundamental error standard of review. *See Henderson*, 210 Ariz. 561, ¶ 26, 115 P.3d at 608-09.

¶9 Salcido next argues the trial court erred in denying his request for a jury trial to determine whether he had a prior conviction, and that, in any event, there was insufficient

evidence to prove the prior conviction. Because Salcido raised neither issue at trial, we again review only for fundamental error. *Henderson*, 210 Ariz. 561, ¶ 22, 115 P.3d at 608.

¶10 In arguing he was entitled to a jury trial on the issue of his prior conviction, Salcido relies on *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004). However, in *Blakely* the United States Supreme Court applied the rule of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000), that, "'[*o*]*ther than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" 542 U.S. at 301, 124 S. Ct. at 2536, *quoting Apprendi*, 530 U.S. at 490, 120 S. Ct. at 2362-63 (emphasis added). Although Salcido acknowledges that the fact of prior convictions continues to be excepted from the purview of *Apprendi*, he claims the reasoning in *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S. Ct. 1219 (1998), in which the Court first enunciated this exception, has been eroded by subsequent cases. However, we rejected this very argument in *State v. Keith*, 211 Ariz. 436, ¶ 3, 122 P.3d 229, 230 (App. 2005), noting that "[w]e are not allowed to anticipate how the Supreme Court may rule in the future." Thus, the trial court did not err in ruling Salcido was not entitled to a jury trial on this issue.

¶11 We now turn to Salcido's argument that there was insufficient evidence to support the trial court's finding that he had an historical prior felony conviction. The proper procedure to establish a prior conviction for sentencing purposes is "for the state to offer in evidence a certified copy of the conviction . . . and establish the defendant as the person to

whom the document refers." *State v. Hauss*, 140 Ariz. 230, 231, 681 P.2d 382, 383 (1984). Salcido does not challenge the documentation of the conviction; rather, he argues "the [s]tate failed to provide the trial court with sufficient evidence showing [he] was the person to which the documents referred." We disagree. During the jury trial, V. S. identified Salcido in court. Salcido did not challenge the sufficiency of this identification either at trial or on appeal. Although the identification alone would not have been sufficient, V. S. also testified that Salcido had been convicted of certain offenses in connection with a domestic violence incident against her in 1997, the year the documented offenses occurred. In addition, he was identified by his full name, Mark Jonathan Salcido, in the indictment, in the court's jury instructions, and in the records of his prior conviction. *See State v. Norgard*, 6 Ariz. App. 36, 41, 429 P.2d 670, 675 (1967) (similarity of names "some evidence of identity"). Thus, there was more than sufficient evidence for the court to link Salcido with the prior conviction. *See State v. Soto-Fong*, 187 Ariz. 186, 207, 928 P.2d 610, 631 (1996) (court may consider at sentencing phase evidence properly admitted during guilt phase). We therefore conclude the trial court did not err in finding Salcido had an historical prior felony conviction for sentence enhancement purposes.

¶12 Finally, Salcido argues the trial court's imposition of the presumptive, concurrent sentences was excessive. As we have noted, the court imposed the presumptive sentence of 6.5-year prison term for the stalking conviction, presumptive terms of 2.25 years for the class five felonies, and presumptive terms of 1.75 years for the class six felonies, all

to be served concurrently. We review a sentence that is within the statutory limits for an abuse of discretion. *State v. Cazares*, 205 Ariz. 425, ¶ 6, 72 P.3d 355, 357 (App. 2003). "We will find an abuse of sentencing discretion only if the court acted arbitrarily or capriciously or failed to adequately investigate the facts relevant to sentencing." *Id.*

¶13 As mitigating circumstances, Salcido presented evidence of his mental health and substance abuse issues, the "overall history" of his relationship with V. S., the lack of serious harm resulting from his actions, and his expression of remorse. The state asked the court to impose aggravated terms, based on Salcido's criminal history, his pattern of domestic violence, his failure to address his substance abuse problems, and the severity of the offenses and their effect on V. S. and their son.

¶14 Salcido presents no evidence, other than the sentences themselves, that the trial court actually failed to weigh the mitigating circumstances. Absent such evidence, we cannot presume the court failed to do so. *See State v. Cid*, 181 Ariz. 496, 501, 892 P.2d 216, 221 (App. 1995) ("[A]n appellate court presumes that the trial court considered all relevant mitigating factors in rendering its sentencing decision."). And, although a trial court must consider evidence offered in mitigation, it is not required to find the evidence mitigating. *State v. Long*, 207 Ariz. 140, ¶ 41, 83 P.3d 618, 626 (App. 2004). A trial court "has the discretion to weigh aggravating and mitigating factors." *State v. Harvey*, 193 Ariz. 472, ¶ 24, 974 P.2d 451, 456 (App. 1998). Thus, the court did not abuse its discretion in sentencing Salcido to presumptive terms of imprisonment.

Disposition

¶15 For the reasons stated above, we affirm.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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PHILIP G. ESPINOSA, Judge